Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS
CLERK

No. 82-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, *Governor, et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway St.
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellants

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE FACT THAT A BLACK CANDIDATE HAS WON THE SECOND DISTRICT DEMOCRATIC PRIMARY DOES NOT NEGATE APPELLANTS' CLAIMS OF DILUTION OF BLACK VOTING STRENGTH IN THE COURT-ORDERED PLAN	3
II. DEFENDANTS' ARGUMENT THAT THE DISTRICT COURT WAS REQUIRED TO ADHERE TO THE STATE'S RACIAL REDISTRICTING POLICY BECAUSE THE ATTORNEY GENERAL'S SECTION 5 OBJECTION WAS "NONDISPOSITIVE" SHOULD BE REJECTED	6
III. PLAINTIFFS' PROPOSED COURT-ORDERED REDISTRICTING PLANS WERE JUSTIFIED BY THE FACTS OF THIS CASE	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Burton v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982) (three-judge court)	2
Busbee v. *Smith*, Civil No. 82-0665 (D.D.C. May 24, 1982) (three-judge court), *stays denied*, No. A-1018 (May 25, 1982 and June 1, 1982)	6, 7
Canady v. *Lumberton*, 454 U.S. 957 (1981)	6
City of Rome v. *United States*, 446 U.S. 156 (1980)	7
Cross v. *Baxter*, 604 F.2d 875 (5th Cir. 1979)	4
Hathorn v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824 (1982)	7
Jordan v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court)	1
Kirksey v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977)	8
McIntosh County Branch of NAACP v. *City of Darien*, 605 F.2d 753 (5th Cir. 1979)	4
Terrazas v. *Clements*, 537 F. Supp. 514 (N.D. Tex. 1982) (three-judge court)	2
Perkins v. *City of West Helena, Arkansas*, 675 F.2d 201 (8th Cir. 1982), *aff'd mem.*, 51 U.S. L.W. 3252 (U.S. October 4, 1982)	3
Perkins v. *Matthews*, 400 U.S. 379 (1971)	7
Sims v. *Amos*, 365 F. Supp. 215 (M.D. Ala. 1973) (three-judge court)	7
United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977)	8
United States v. *Board of Supervisors of Forrest County*, 571 F.2d 51 (5th Cir. 1978)	4
United States v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 652 (1977)	6
Upham v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982)	1, *passim*
Wise v. *Lipscomb*, 347 U.S. 535 (1978)	7
Yelverton v. *Driggers*, 370 F. Supp. 612 (S.D. Ala. 1974)	4

TABLE OF AUTHORITIES—Continued

Page

Zimmer v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1975) 3

Other Authorities

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) 5
S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Admin. News 774 7
(Jackson) *Clarion-Ledger*, Aug. 18, 1982 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-233

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, *Governor, et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

The crux of this appeal is that, having acknowledged the Attorney General's ruling that the state's congressional redistricting plan (S.B. 2001) violates Section 5 of the Voting Rights Act, *Jordan* v. *Winter*, 541 F. Supp. 1135, 1141-42, the District Court was without authority to disregard that objection and the clear statutory mandate of Congress by ordering into effect a court plan which defers to the objected-to state racial policy embodied in S.B. 2001.

This case is part of the judicial fallout of *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982), and presents important questions raised, but not resolved, by that decision. In *Upham*, this Court affirmed the decision of the District Court to correct portions of the plan to

which the Attorney General objected, but directed the District Court to defer to those district boundaries to which the Attorney General did not object.

The *Upham* decision has created widespread confusion among the lower courts regarding the scope of their remedial authority to correct Section 5 violations. In this case, the District Court felt compelled by the *Upham* mandate to adhere to the state's "political program" to adopt an alternative congressional redistricting which incorporates the state's racial redistricting policy—the creation of majority white districts which are 40% or better black—to which the Attorney General objected. In two other cases, *Burton* v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982) (three-judge court), and *Terrazas* v. *Clements*, 537 F. Supp. 514 (N.D. Tex. 1982) (three-judge court), District Courts actually adopted districts to which the Attorney General had objected under Section 5. For the minority citizens of these covered jurisdictions, as for the appellants in the present case, these District Court actions have undermined the important statutory protections of the Voting Rights Act and deprived minority citizens of a judicial remedy for Voting Rights Act violations.

In responding to our Jurisdictional Statement, the state official defendants (1) contend that the fact that a black candidate has won the Democratic primary in the court-ordered Second District vitiates appellants' claims of dilution (Motion to Dismiss or Affirm, pp. 5-6); (2) argue that the District Court's adoption of the objected-to state racial redistricting policies is consistent with *Upham* because there was no adjudicated Section 5 violation in this case (*id.*, pp. 7-10); and (3) make the irrelevant and inflammatory contention that appellants claim a constitutional and statutory right to a 65% black district (*id.*, pp. 10-12). Defendants' arguments in their Motion to Dismiss or Affirm clearly indicate that this appeal raises substantial and recurring questions

which should be resolved by this Court upon plenary consideration. However, defendants' contentions fail to provide a basis for summary affirmance or dismissal of this appeal.

I. THE FACT THAT A BLACK CANDIDATE HAS WON THE SECOND DISTRICT DEMOCRATIC PRIMARY DOES NOT NEGATE APPELLANTS' CLAIMS OF DILUTION OF BLACK VOTING STRENGTH IN THE COURT-ORDERED PLAN.

Defendants concede that the Second District in the court-ordered plan is white majority in voting age population and registered voters. Motion, p. 6. The mere fact that a black candidate, state Rep. Robert Clark, has won the Democratic primary, even if he wins the general election in November, does not as a matter of law preclude a finding of unlawful dilution of black voting strength. *Perkins* v. *City of West Helena, Arkansas*, 675 F.2d 201 (8th Cir. 1982), *aff'd mem.*, 51 U.S.L.W. 3252 (U.S. October 4, 1982); *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1975).[1] This

---

[1] In *Zimmer* the court held (485 F.2d at 1307):

> While acknowledging that the instant facts might theoretically present a case of dilution, appellee argued that 1971 and 1972 elections under the at-large plan, with the attendant success of 3 black candidates, dictated a finding that the at-large scheme did not in fact dilute the black vote. The significance attached to success at the polls in the instant case is unavailing, however, for two reasons. First, these results were not before the district court when it rendered the opinion we are presently reviewing. It is axiomatic that an appellate court cannot take cognizance of matters not passed upon by the trial court. Second, we cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that

principle has been recently endorsed by Congress in extending the protections of the Voting Rights Act and in amending Section 2 of the Act to incorporate a "results" test. In discussing the criteria to be applied by courts in implementing the new Section 2 "results" test, the Senate Report states:

> The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote", in violation of this section. *Zimmer* 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section, e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution . . . . Instead we shall continue to require an independent consideration of the record." *Ibid.*

---

the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record.

The proposition that the election of black candidates does not foreclose a finding of dilution also was endorsed in: *McIntosh County Branch of NAACP* v. *City of Darien*, 605 F.2d 753, 765 (5th Cir. 1979); *Cross* v. *Baxter*, 604 F.2d 875, 885 (5th Cir. 1979); *United States* v. *Board of Supervisors of Forrest County*, 571 F.2d 51, 956 (5th Cir. 1978); and *Yelverton* v. *Driggers*, 370 F. Supp. 612, 616 (S.D. Ala. 1974).

S. Rep. No. 97-417, 97th Cong., 2d Sess. 29 n. 115 (1982).

The black candidate's primary victory occurred after the trial of this case, and therefore the circumstances of his nomination are left undeveloped on this record. However, there are certain judicially noticeable salient facts which may explain this phenomenon. First, the same newspaper article upon which defendants rely (Motion, p. 6 n. 5) notes that "observers from throughout the court-drawn 2nd District reported a generally low voter turnout . . ." (Jackson) *Clarion-Ledger*, August 18, 1982, p. 1. Press reports attribute the low turnout to the lack of a strong white candidate, rain, confusion over election dates, the lack of an incumbent candidate, and court-ordered realignment of the district. *Id.*, pp. 1A, 2B. These reports tend to indicate that the off-normal-schedule August 17 primary was not a typical congressional primary election, and therefore not a real test of whether the district is discriminatory. Second, less than a week prior to the August 17 primaries, the District Court entered an order permitting Republican voters to participate in the Democratic congressional primary election. Order of Preliminary Injunction of August 13, 1982. This order enabled white Republicans to vote for Clark in the Democratic primary in order to give the white Republican nominee, Webb Franklin, a better chance of winning in the November general election.

In any event, Clark's primary victory does not dissolve the important legal question presented of whether the District Court erred in deferring to state racial redistricting policies found to violate Section 5.

II. DEFENDANTS' ARGUMENT THAT THE DISTRICT COURT WAS REQUIRED TO ADHERE TO THE STATE'S RACIAL REDISTRICTING POLICY BECAUSE THE ATTORNEY GENERAL'S SECTION 5 OBJECTION WAS "NONDISPOSITIVE" SHOULD BE REJECTED.

In defending the District Court's decision, the state official defendants make the bold argument that, contrary to *Upham*, the District Court was not obliged to remedy any constitutional or statutory defect in the state's plan because there was none. Defendants' argument turns upon the belief that coverage under Section 5 of the Voting Rights Act and the Attorney General's Section 5 objection have no legal consequences. "Thus no violation of the Voting Rights Act has ever been adjudicated and the statutory validity of S.B. 2001 remains undetermined." Motion, p. 9. The Attorney General's admittedly valid Section 5 objection, they state, is "nondispositive" and constitutes only "preliminary findings." *Id.*

Defendant's argument underlines the point made in our Jurisdictional Statement. The District Court's decision, and defendants' defense of that decision, constitute a direct challenge to the fundamental statutory framework of Section 5, which has withstood seventeen years of litigation and three congressional extensions.

The District Court's overriding of the Attorney General's Section 5 objection, and the defendants' arguments in support of that ruling, create an irreconcilable conflict with cases holding that the Attorney General's Section 5 objection is dispositive of a Section 5 violation, absent a Section 5 declaratory judgment from the District Court for the District of Columbia. See *Canady* v. *Lumberton City Board of Education*, 454 U.S. 957 (1981); *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 652 (1977). Nor does the mere filing of a Section 5 declaratory judgment action vitiate the Attorney General's objection. *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. May 24, 1982) (three-judge court),

stays denied, No. A-1018 (May 25 and June 1, 1982) (Burger, C.J., and Rehnquist, J.).

The statutory framework of Section 5 clearly creates a presumption for covered states and jurisdictions that any new voting scheme is racially discriminatory and cannot be implemented unless the state sustains its burden of proving that the new plan is not racially discriminatory in purpose or effect. *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980). Once a Section 5 objection has been lodged, "the normal presumption of legitimacy afforded the balances reflected in legislative plans, see *Burns*, *supra*, at 84-85, could not be indulged." *Wise* v. *Lipscomb*, 437 U.S. 535, 549 (1978) (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ.). See also, *Perkins* v. *Matthews*, 400 U.S. 379, 406 (1971) (Black, J., dissenting); *City of Rome* v. *United States*, *supra*, 446 U.S. at 205 (Powell, J., dissenting) ("The preclearance requirement enforces a presumption against voting changes by certain state and local governments."); *Sims* v. *Amos*, 365 F. Supp. 215, 220 n.2 (M.D. Ala. 1973) (three-judge court). The legislative history of the Voting Rights Act makes clear that Congress has intended that "courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court." S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975), reprinted in [1975] U.S. Code Cong. & Admin. News 774, 784.[2]

---

[2] In arguing that the District Court was not limited by the need to cure any statutory defect in this case, defendants also make the irrelevant argument that the plaintiffs are precluded from litigating the constitutionality of the Mississippi Legislature's 1966 congressional redistricting plan because they are bound by the *Connor* v. *Johnson* decision by operation of res judicata or collateral estoppel. Motion, pp. 7-8. As a matter of fact, the plaintiffs in this case were not parties to the *Connor* v. *Johnson* litigation, and therefore are not in any way bound by the resolution of the constitutional issue in that case. See *Hathorn* v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824, 836 n. 23 (1982).

III. PLAINTIFFS' PROPOSED COURT-ORDERED REDISTRICTING PLANS WERE JUSTIFIED BY THE FACTS OF THIS CASE.

In a stipulation which was admitted in evidence in this case (Ex. P-1), the State of Mississippi admitted:

> 16. Low black voter registration and voter turn-out combined with racial bloc voting make it necessary for an electoral district in Mississippi to contain a substantial majority of black eligible voters in order to provide black voters with an opportunity to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances such as two candidates splitting the vote, a district should contain a black population of at least 65 percent or a black VAP of 60 percent to provide black voters with an opportunity to elect a candidate of their choice. In more recent elections black candidates have, on occasion, been elected to public office from districts with a population less than 65 percent black.

Also, the Attorney General in his Section 5 objection letter selected the pre-1966 Delta district, which was 65% black, as the benchmark for measuring whether the 1981 "least change" plan had a discriminatory effect prohibited by Section 5 (J.S., Appendix B, p. 26a). Given these facts, plaintiffs were fully justified in urging the District Court to adopt the Kirksey plans, which restored the 65% black Delta district, as a remedy for the unlawful dilution of black voting strength accomplished by the state's plan. *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977); *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 151 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977). Because plaintiffs advanced their proposed court-ordered plans as a remedy for the statutory violation found by the Attorney General, and not as a matter of right, defendants completely misconstrue our argument and engage in inflammatory and irrelevant demagoguery when they contend (Motion p. 10) that plaintiffs are arguing that

"black citizens of Mississippi have a constitutional right and statutory entitlement to a 65% black Congressional district." Because this remedy was fully justified by the facts of this case, the District Court's ruling that plaintiffs' plans "represent an obvious racial gerrymander" (541 F. Supp. at 144) should be repudiated by this Court.

CONCLUSION

For these reasons, the motion to dismiss or affirm should be denied, and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway St.
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellants

* Counsel of Record